IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 458 OF 2006

Smt. Pushpaben Mulji Kothari & ors. ... Petitioners

V/s

Smt. Lilavati Gokuldas Morarji & ors. ... Respondents

Ms. Vaishali Thorat holding for Mr. P.J. Thorat for the petitioners.

Mr. N.V. Walawalkar with Mr. S.R. Bhalekar for respondent Nos. 1 to 3.

CORAM: P.V. KAKADE, J.

DATED: 7TH MARCH, 2006

P.C.:

1. Heard learned counsel for both parties. Perused the record.

2. The petition is preferred by the original plaintiff against the order passed by the lower appellate Court dated 25.10.2005 dismissing the appeal and confirming the order passed by the Trial Court on 14.10.2002 in Interim Notice No. 1887/2000 in RAD Suit No. 731 of

2001.

3. The plaintiffs filed the suit for declaration and injunction against the respondent-defendants praying that they be declared as tenant in respect of the suit premises and the respondent-defendants be restrained by issuing permanent order of injunction from demolishing or damaging the suit premises or any part thereof and/or from causing any damages to the roof and walls of the suit premises and from demolishing or doing anything adjoining rooms both on the ground floor as well as upper floor. They have also prayed for permanent injunction order restraining the defendants from digging the land around the suit premises causing obstructions of any nature to the plaintiffs and their family members from having access to the suit premises and dispossessing the plaintiffs from the suit premises and/or from disturbing the plaintiffs' peaceful use, occupation and enjoyment of the suit premises without due process of law. They have also prayed for mandatory injunction directing the respondents to remove the structure illegaly constructed by them by the side of the common W.C. and also to remove the construction material lying in the passage passing from the rear side of the suit premises upto common W.C. and thereby

restore the user and enjoyment of the said common W.C. to the plaintiffs through the said passage and for other consequential reliefs.

4. The suit is still pending final adjudication. In the pending suit, interim notice was moved for temporary injunction against the respondents for similar prayers and seeking restrainment in the abovesaid manner.

5. The Trial Judge, after hearing both parties, on the basis of available evidence, came to the conclusion that the petitioner-plaintiffs had made out a prima facie case and it was further held that irreparable loss would be caused if the injunction is refused to both parties. The finding was also recorded to the effect that the balance of convenience lies in favour of both parties and notice was partly made absolute with directions that the defendants were allowed to demolish two rooms on the western side of the suit premises without touching the common wall of the ground floor and wall adjoining to the staircase in presence and under the supervision of the Architect or Structural Engineer suggested by the plaintiffs. They were also allowed to dig the land nearby the suit premises for joining the drainage line to the main chamber as per the sanctioned plan by the

B.M.C. in presence and under the supervision of the said Architect or Engineer as suggested by the plaintiffs. While digging the land or demolishing the rooms on the western side, if any cracks or damage is caused to the suit premises, or if the suit premises is collapsed during the course of the demolition, the defendants have to restore the same or construct the same at their own cost and expenses. They were directed to maintain the stability of the suit premises. So also at the time of carrying out these activities, they must take care to see that the access of the plaintiffs to the suit premises is not obstructed in any manner.

Being aggrieved by this order, the petitioner-plaintiffs carried the appeal to the lower appellate Court, who, after hearing both parties, came to the conclusion that no fault could be found with the reasonings adopted and findings recorded by the Trial Court and dismissed the appeal. Hence the petition.

6. At the outset, it may be noted that the learned counsel for the petitioner took me through the entire record which is part of the compilation including the history and back ground of the dispute alongwith various parallel interim proceedings which were taken up by them

in the course of the suit.

7. On perusal of the judgment of both the Courts below, it is clearly seen that the apprehension in the mind of the plaintiffs appears to be genuine to the effect that, while making construction defendants may not protect the suit premises and, therefore, the suit for injunction came to be filed. Perusal of the lower Trial Court's order shows that after considering the submissions on behalf of both parties, the Trial Court has rightly concluded that the plaintiffs have made out a prima facie case to seek proper protection from the Court with regard to the suit premises and order came to be passed as noticed earlier.

8. The appellate Court was of the view that the Trial Court has taken into account all the facets of the dispute and noted the submissions on behalf of the respondents that they were interested in protecting the suit premises and, therefore, defendants should be allowed to put the drainage line as per the sanctioned plan of the B.M.C. provided that the defendants be asked to reconstruct the entire suit premises or any part thereof, if the same is demolished or collapsed during the course of demolition of the adjoining

premises or the work of drainage line and that the respondents should be allowed to do the said work of drainage line as per the rules and regulations of the B.M.C.

I am informed that since the order passed by the lower appellate Court, the work of laying down the drainage pipe-line is complete and, therefore, there cannot be any dispute in that aspect and no elaborate discussion on that aspect is required to be made.

The lower appellate Court appears to be satisfied that the Trial Court has put sufficient safeguard in order to protect the interest of the petitioner-plaintiffs and under the circumstances it was held that it was not a fit case for interference by the said appellate Court and hence the appeal came to be dismissed.

In turn, I must note that, I am also satisfied with the fact that the interest of the petitioner is very well guarded by the orders of both the Courts below and, therefore, no interference in this regard is required as contemplated by virtue of Art. 227 of the Constutiton except for certain additions in the order passed by the Trial Court which is confirmed by the appellate Court.

9. Hence, the petition stands dismissed as no interference is required to be made. However, it is clarified that in case the suit premises is damaged or demolished in the course of the construction to be made by the respondents, the respondents shall repair the damages or reconstruct the same to restore it to its original position within two weeks from the date of such demolition or destruction of the suit premises or part thereof at his own cost as directed by the Trial Court. While doing so, the ingress and egress are also to be protected by the respondents. As directed by both the Courts below, the petitioner-plaintiffs shall suggest the name of its Architect or Structural Engineer for supervision over the construction work to be made by the respondents within one week from the date of this order so as to enable the respondents to commence the work of construction immediately.

10. With these directions, the petition stands disposed of with no order as to costs.

It is clarified that in case of any major repairs or reconstruction is necessitated due to damage to the suit property, then the respondents shall be liable to seek

permission of the competent authority including Municipal Corporation, etc. for the said purpose. It is also clarified that if such reconstruction is necessitated then the reconstructed suit premises would be treated as old original structure and the rights and contentions of both parties are left open to be

adjudicated at the time of final hearing of the suit in that regard as well as in the suit pending in the City Civil Court.

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